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No. 82-22

In The

Supreme Court of the United States

October Term 1982

JAMES M. NAMEN, et al. and STATE OF MONTANA,

Petitioners,

vs.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al. and UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF ARIZONA, IDAHO, IOWA, MINNESOTA, NEW MEXICO, NORTH DAKOTA, OREGON, SOUTH DAKOTA, UTAH, WASHINGTON, WEST VIRGINIA, AND WISCONSIN, IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I.

Does the language of the 1855 Treaty of Hell Gate rebut the "strong presumption" against conveyance of the bed and banks of navigable waterways to Indian tribes, as recognized by this Court in *Montana v. United States*, 450 U. S. 544 (1981)?

II.

May an Indian tribe regulate the exercise of riparian rights owned by non-Indian reservation land owners where the exercise of those rights has not been shown to threaten "the political integrity, the economic security, or the health or welfare of the tribe?"

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are states which have Indian reservations within their boundaries. Many of these reservations contain or abut navigable bodies of water, the lands riparian to which are owned, at least in part, by non-Indians.[1] This

[1]In Idaho, for example two of the four Indian reservations contain large amounts of land owned by non-Indians. On the Nez Perce Reservation, 669,000 of the 756,000 acres, or 88.5%, is owned by non-members of the tribe. One of the state's

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Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), clarified the rights of these riparian owners vis-a-vis the reservation tribes by holding, first, that absent a clearly expressed contrary intention supported by exigent circumstances, the setting aside by Congress of certain lands for an Indian reservation does not convey to the Indians title to the bed and banks of navigable waterways contained within the granted territory, and, second, that the tribes' sovereign powers do not allow civil regulation of non-Indians "beyond what is necessary to protect tribal self-government or to control internal relations." 450 U.S. at 564. The decision of the Ninth Circuit Court of Appeals in this case, reported as *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), either misapplies the rules announced by this Court in *Montana*, or construes this Court's decision so narrowly as to render it inapplicable beyond its own facts.

While not all of the states who join this brief are directly interested in the law governing ownership of navigable waterways within Indian reservations,[2] all of the

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major fisheries, the Clearwater River, flows through the Nez Perce Reservation. On the Coeur d'Alene Reservation, approximately 80% of the 345,000 acres is owned by non-members of the tribe. The boundaries of the Coeur d'Alene Reservation contain several navigable bodies of water including the St. Joe River and Lake Coeur d'Alene. In addition, the Snake and Blackfoot Rivers form portions of the boundary of the Fort Hall Reservation.

Similarly, in Washington, much of the land on the state's 23 reservations has passed into non-Indian ownership. *See, e.g., Puyallup Tribe v. Washington Department of Game*, 433 U.S. 165 (1977). The non-Indian population of Washington's reservations is approximately 58,000, while the Indian population of the reservations is approximately 13,500. Most of these reservations contain navigable waters within their boundaries.

[2]The States of Utah and New Mexico have no Indian reservations which contain or abut navigable waterways. They share

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amici states are vitally interested in assuring that the rules announced by this Court to govern relations between tribal governments and non-members are consistently and conscientiously applied by lower courts. The amici states include states within the Ninth Circuit whose rights are directly controlled by the decision in this case. In addition, litigation involving those amici states from other circuits will undoubtedly be influenced by this decision. The Ninth Circuit's ruling invites the Indian tribes in the amici states to assert ownership rights and regulatory powers which are foreclosed under any proper reading of the *Montana* case. If the principles announced in *Montana* are to be applied properly and uniformly this Court should grant certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

STATEMENT OF THE CASE

The case and facts are fully set forth in the petition for certiorari.

SUMMARY OF ARGUMENT

The Court should grant certiorari and reverse the decision of the Court of Appeals because that decision misapprehends the proper application of the decision in *Montana*.[3] First, *Montana* holds that Congress' intent to

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the interest of the other amici that the Court of Appeals has misapplied this Court's decisions regarding tribal regulatory authority over non-members.

[3]This Court has cited a Court of Appeals' misapplication of controlling precedent as a ground for granting certiorari. *See, e. g., Schlude v. Comm'r*, 372 U. S. 128, 130 (1963); *Wilkinson v. United States*, 365 U. S. 399, 401 (1961); *see also Ramah Navajo School Board v. Bureau of Revenue*, 50 U. S. L. W. 5101, 5105 (1982).

convey the bed and banks of navigable waterways when an Indian reservation is created may not be inferred from the mere inclusion of the waterway within reservation boundaries. The Court of Appeals drew precisely this prohibited inference in the present case. Moreover, the Court of Appeals, in deciding that the tribes had the power to regulate the exercise of riparian rights by non-members, ignored the record in this case and applied a legal standard inconsistent with this Court's decision in *Montana*. These holdings will have widespread adverse impacts in the amici states unless this Court intervenes by requiring the Court of Appeals to follow the law expressed in *Montana*.

REASONS FOR GRANTING THE WRIT

I.

The holding of the Court of Appeals that the Treaty of Hell Gate conveyed the bed and banks of Flathead Lake to the tribes is inconsistent with this Court's holding in Montana v. United States.

The question presented in this case is identical to the one considered by this Court in *Montana*—whether treaty language which establishes a reservation conveys to the Indians title to the bed and banks of a navigable waterway located within the reservation boundaries. In *Montana*, this Court stated the governing principles as follows:

> [B]ecause control over the property underlying navigable waters is so strongly identified with the sover-

> eign power of government, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," or was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream."

450 U. S. at 552 (citations omitted). The Court explicitly stated that the mere fact that a body of water is included within the boundaries of a reservation does not overcome the presumption against conveyance absent some explicit reference to the bed of the waterway. *Id.* at 554.

In the present case, the Court of Appeals distinguished *Montana* on three grounds. First, the court noted the existence of precedent in the Ninth Circuit holding that the Hell Gate treaty conveyed title to the lakebed, and stated that precedent on questions of title to real estate was entitled to special deference. 665 F. 2d at 960-61. Second, the court noted that the Treaty of Hell Gate explicitly refers to Flathead Lake, while the treaty at issue in *Montana* made no reference to the Bighorn River. 665 F. 2d at 961-62. Finally, the court noted that unlike the Crow Tribe in *Montana*, the Confederated Salish and Kootenai Tribes relied on fishing for sustenance, providing a "public exigency" to support conveyance of the lakebed which was absent in *Montana*. 665 F. 2d at 962. On close analysis, none of these factors supports the decision of the Court of Appeals.

As to the effect of precedent, *Montana* clearly shows that the question of title depends on the intent of Congress as expressed by the language of the treaty evaluated in light of the circumstance at the time.[4] None of the three cases cited by the Court of Appeals here—*United States v. Pollmann*, 304 F. Supp. 995, 999 (D. Mont. 1973), *Montana Power Co. v. FPC*, 459 F. 2d 863, 865 (D. C. Cir.), *cert. denied*, 408 U. S. 930 (1972), and *Montana Power Co. v. Rochester*, 127 F. 2d 189, 191 (9th Cir. 1942)—contains an analysis of the factors declared by *Montana* to be relevant in evaluating the intent of Congress. The Court of Appeals nevertheless found the prior cases to be entitled to particular deference because of "the special reliance these decisions command" in establishing title to property. 665 F. 2d at 960. The Court of Appeals ignored the fact that the United States District Court for the District of Montana had held on at least three occasions that title to the bed and banks of the Bighorn River was held by the Crow Tribe. *Crow Tribe v. United States*, Civ. No. 214 (D. Mont. 1963); *United States v. 5677.94 Acres of Land*, 162 F. Supp. 108, 117 (D. Mont. 1958); *United States v. 5677.94 Acres of Land*, 152 F. Supp. 861, 863 (D. Mont. 1957); *see also United States v. Finch*, 548 F. 2d 822 (9th Cir.), *vacated on other grounds*, 433 U. S. 676 (1977). *Montana* does not discuss this precedent as having any particular relevance in determining the intent of Congress. The Court of Appeals therefore erred in giving particularly deferential consideration to *Rochester* and its Ninth Circuit

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[4]See *Oliphant v. Suquamish Tribe*, 435 U. S. 206, 208 n. 17 (1978).

progeny while ignoring the controlling precedent of *Montana*.

The reliance of the Court of Appeals on the express inclusion of the south half of Flathead Lake within the reservation boundaries is flatly inconsistent with the reasoning of this Court in *Montana*. The Court of Appeals inferred an intent to convey the lakebed from the mere fact of inclusion. The Court cited no language explicitly referring to the lakebed, as *Montana* requires, because no such language may be found in the treaty. Thus, the Court neatly reversed the presumption affirmed in *Montana*, by concluding that language which merely included the body of water within the reservation conveyed its bed and banks as well.

The Court of Appeals found a "public exigency" to support the conveyance of the lakebed in the fact that the tribes in question in this case were historically reliant on fishing.[5] Even if this is so, nothing in *Montana* suggests that the existence of a public exigency alone rebuts the presumption against conveyance. Here, the treaty protects the tribes' fishing rights, granting them the "exclusive right of taking fish in all the streams running through or bordering said reservation . . . as also the right of taking fish at all usual and accustomed places, *in common with the citizens of the territory*." 12 Stat. 975, Art. III (July 16, 1855) (emphasis added). Nothing in this treaty suggests an intention to grant to the tribes the exclusive enjoyment of fishing rights on the south

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[5]The State of Montana contested this finding in the Court of Appeals, since most of the Confederated Tribes relied on hunting for sustenance. *See, e. g., Confederated Salish & Kootenai Tribes v. United States*, 8 Ind. Cl. 40, 43, 46, 47, 51, 52, 54.

half of Flathead Lake. *Cf. Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 88-89 (1918) (manifest congressional intent to assist in establishment of tribal fishing industry found to support conveyance of bed of waterway). The fact that the treaty explicitly protects tribal fishing rights in this manner, without reference to the bed and banks of the lake, negates the inference drawn by the Court of Appeals.

The decision of the Court of Appeals in this case denied the petitioners the benefit of this Court's decision in *Montana*. If left intact, this holding will adversely affect the rights of the amici states and their citizens, and will encourage litigation, since under the analysis of the Court of Appeals, *Montana* is apparently to be limited to its facts. This Court should grant certiorari to prevent the widespread adverse impact which this decision will produce.

II.

The Court should grant certiorari to resolve the conflict perceived by the Court of Appeals between the decisions in Montana and Washington v. Confederated Tribes of The Colville Reservation.

In *Confederated Salish and Kootenai Tribes v. Namen*, 534 F. 2d 1376 (9th Cir.), *cert. denied*, 429 U.S. 929 (1976), the Court of Appeals for the Ninth Circuit recognized that non-Indian owners of lands abutting the south half of Flathead Lake owned riparian rights of access and wharfage. In the present case, the Court of Appeals ruled that the tribes nevertheless had the sovereign power

to regulate the exercise of these riparian rights. The Court perceived two standards which could be applied to determine the propriety of this regulation, one enunciated in *Montana* and the other pronounced earlier in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980). In *Montana*, the question was whether the tribe could regulate the hunting and fishing activities of non-Indians conducted on lands within the reservation but not owned or controlled by the tribe.[6] The Court stated the general rule as follows: "[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. In *Colville*, the question involved the tribes' power to levy a tax on the sale of cigarettes on the reservation by the tribe to non-members. The Court sustained the tax, holding that tribal civil jurisdiction to tax such consensual commercial activities on tribal lands is divested only "in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National government." 447 U.S. at 153. The Court of Appeals noted that *Montana* did not overrule or even discuss the *Colville* standard. However, the court found no federal interests infringed by tribal regulation and concluded that the *Colville* test was

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[6]The first part of the analysis of the Court of Appeals in this case rested on the premise that the exercise of riparian rights at issue here—construction of docks and wharves—actually involved non-Indian use of tribal trust land, since the docks and wharves in question intruded into the bed and banks of the lake which the Court had earlier found to belong to the tribe. This analysis falls for the reasons discussed in Part I, *supra*.

therefore satisfied. 665 F. 2d at 963-64. The Court also concluded that exercise of riparian rights by non-members could directly threaten or affect the political, economic, or social welfare of the tribe, and that under *Montana* tribal regulation of such conduct could be sustained. *Id.* at 964.

Amici submit that the court's analysis under the *Montana* standard is fatally flawed. This Court did state in *Montana* that a tribe may exercise civil jurisdiction over the conduct of non-Indians on non-Indian land within a reservation where the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U. S. at 566. However, the Court did not sustain the Crow tribe's regulation in *Montana* because the tribe made no factual showing that non-Indian hunting and fishing infringed on tribal subsistence or welfare. Here, unlike *Montana*, the tribes alleged in their complaint that the exercise of non-Indian riparian rights would detrimentally affect their fishing rights and the ecology of the lake. However, the counts containing these allegations were not proved and were dismissed by the district court with prejudice, a ruling which the tribes did not appeal. The tribes' failure to prove the detrimental impact alleged in the complaint establishes that for purposes of this case the adverse impacts inferred by the Court of Appeals do not exist. The tribes in this case stand on no better footing than did the Crow tribe in *Montana* in alleging detrimental impact on tribal subsistence or welfare.[7]

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[7] *Montana* clearly shows that exercise of regulatory jurisdiction over non-Indians on non-Indian land is the exception

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Since the holding of the Court of Appeals under the *Montana* standard is so obviously infirm, the Court is squarely presented with the question of whether the validity of the regulation in question here can be controlled by the decision in the *Colville* case. Amici submit that it may not. The conflict perceived by the Court of Appeals between the *Montana* and *Colville* case is illusory. Unlike *Montana, Colville* dealt with tribal civil jurisdiction to tax a non-member's commercial transaction with the tribe conducted on tribal land. The Court took great pains to distinguish taxation from the other forms of tribal regulation considered by the Court in *United States v. Wheeler*, 434 U.S. 313 (1978), and in *Oliphant v. Suquamish Tribes*, 434 U.S. 791 (1978), the case discussed at greatest length by the Court in *Montana*. 447 U.S. at 153-54; *see Montana*, 450 U.S. at 565. In contrast, the tribes in this case seek to regulate the exercise by non-members of riparian rights which exist as a result of the non-members' ownership of land abutting the lake. *Montana* recognizes that such a regulation is impermissible since it "bears no clear relationship to tribal self-government or internal relations." 450 U.S. at 564. This Court has not considered *Colville* as establishing a general rule on tribal jurisdiction over non-members for application

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rather than the rule, and that the party asserting the exception must prove the proper factual predicate. This is appropriate since tribal constitutions commonly exclude non-members from the tribal political process which seeks to regulate their conduct.

in cases not involving taxation of consensual commercial activities on tribal lands. *See, e.g., Merrion v. Jicarilla Apache Tribe,* 102 S. Ct. 894 (1982).[8] The Court should grant certiorari in this case to correct the Court of Appeals' mistaken view of the applicability of *Colville.*

CONCLUSION

One would have thought that the issues involved in this case would no longer be open to question given this Court's decision in *Montana.* However, the decision of the Court of Appeals in this case effectively circumvents the holdings in *Montana* by finding, first, that the mere inclusion of the south half of Flathead Lake within the boundaries of the Flathead Reservation worked a conveyance of the bed and banks of the lake to the tribes, and, second, that in any event the tribes could regulate the exercise of riparian rights on non-Indian land by non-Indians. These holdings raise substantial questions of

[8]The view that *Colville* applies in this context only to tribal taxes imposed on activities conducted on Indian lands is buttressed by the fact that less than one year after deciding *Montana,* this Court decided *Merrion,* a case involving a tribal tax on minerals severed from tribal land by non-Indians pursuant to a lease with the tribe. *Merrion* cites *Colville* as establishing the rule that the power to tax "transactions occurring on trust lands and significantly involving the tribe and its members" is a fundamental attribute of tribal sovereignty. 102 S. Ct. at 901. The Court did not cite *Montana, Oliphant,* or *Wheeler. But see* 102 S. Ct. at 918-19 (Stevens, J., dissenting). Moreover, in *Montana,* the Court cited *Colville* only for the limited proposition that a tribe retains the power to tax non-Indians' consensual on-reservation commercial contacts with the tribe. 450 U. S. at 566.

importance to the amici states and their citizens, as to the effect of the *Montana* decision and its relationship with the prior decision in *Colville*. This Court should grant the petition for certiorari to resolve these problems.

Respectfully submitted this 27 day of July 1982.

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